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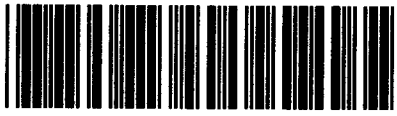

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October 7, 2010

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AT&T TEXAS' EXCEPTIONS TO THE ARBITRATORS' PROPOSAL FOR AWARD

COMES NOW Southwestern Bell Telephone Company d/b/a AT&T Texas ("AT&T Texas") and files these Exceptions to the Arbitrators' Proposal for Award.

I. EXECUTIVE SUMMARY

This arbitration of an interconnection agreement under §§ 251 and 252 of the federal Telecommunications Act of 1996 ("FTA") is controlled by federal law. The Arbitrators have properly recognized that federal law governs and have also properly recognized that the issues in this case must be controlled by "existing law,"[1] which is found in both Federal Communications Commission ("FCC') precedent and Texas Public Utility Commission ("Commission") decisions applying that federal law.

In resolving the Enhanced Service Provider ("ESP") traffic issues in this arbitration, the Arbitrators have created a compensation system that has no precedent in either FCC statutes, decisions or rules or in Commission decisions implementing that federal law. Under this compensation system, an ESP's Point of Presence ("POP") determines whether a call is local or long distance. Points of Presence have never been and cannot now be a geographic basis for jurisdictionalizing calls. The FCC

[1] Proposal for Award at 44.

requires an end-to-end analysis of calls, and the POP test the Arbitrators have crafted violates that established, "existing" federal law.

Instead of following "existing law," the Arbitrators' new POP test would allow UTEX to break a call into two parts and treat a call as beginning at the POP where UTEX receives the call from an "ESP," when the actual calling party is located thousands of miles away. This method of jurisdictionalizing calls is in direct conflict with both the holdings and the reasoning in PUC Docket No. 33323, where the Commission rejected a similar argument propounded by UTEX, finding it an impermissible mechanism for regulatory arbitrage.[2] The contract language the Arbitrators have crafted would also allow IP-in-the-middle traffic to avoid access charges, contrary to very *IP-in-the-Middle-Order* the Arbitrators cite in their Proposal for Award as controlling authority.[3] In short, the Arbitrators' misconceived compensation system misapplies an exemption intended for ESPs to give a carrier – UTEX – an exemption from its responsibility to pay access charges when it is functioning as an interexchange carrier ("IXC") by delivering long-distance traffic to AT&T Texas. Moreover, there is no evidence in the record to support the new POP test, and neither party offered it as a solution.

The Arbitrators also exceed the Commission's authority under §§ 251 and 252 of the federal Telecommunications Act in ordering AT&T Texas to perform switch translations for UTEX's 500 numbers and requiring the parties to establish a

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[2] Docket No. 33323, *Petition of AT&T Texas for Post-Interconnection Dispute Resolution With UTEX Communications Corp., Under the FTA Relating to Billing Disputes on UTEX's Termination of Traffic and LNP Queries,* Arbitration Award at 111 ("UTEX has described the process carrier's carriers use to avoid paying intercarrier compensation for terminating calls.").

[3] Proposal for Award at 46.

compensation system for AT&T Texas' services in routing calls to those 500 numbers. 500 number service is a federally tariffed access service. The Arbitrators have no authority to establish the terms and conditions for providing an access service that is governed by federal law. Section 251(g) expressly provides that ILECs are entitled to provide access services under the existing terms unless and until the FCC "explicitly" supersedes those terms (*i.e.,* tariffs). The terms and conditions under which AT&T Texas is required to provide 500 service to UTEX or to UTEX customers is governed by the AT&T Texas federal access tariff, and the Texas Commission has no authority to set a different compensation system in a §§ 251/252 interconnection agreement.

The Arbitrators' ruling allowing UTEX to obtain the Collocation Power Amendment violates the time limits that the Commission placed on the availability of this amendment in Docket No. 28821.[4] Per the terms of Docket No. 28821, the Collocation Power Amendment ceased to be an available provision in interconnection agreements entered into after December 26, 2006. The Commission recognized this time limitation recently in Docket No. 35982,[5] in which the Commission rejected Level 3's attempt to acquire the Collocation Power Amendment. The Arbitrators should reverse this ruling as violative of the precedent in both Docket Nos. 28821 and 35982. The Arbitrators should also reverse this ruling as inconsistent with the Arbitrators' own ruling in Order No. 30, in which the Arbitrators ordered the Collocation Power Amendment excluded from the interconnection agreement terms UTEX was proposing.

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[4] Docket No. 28821, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement* ("Docket No. 28821").

[5] Docket No. 35982, *Petition of Level 3 Communications, LLC for Post Interconnection Dispute Resolution With Southwestern Bell Telephone L.P. dba AT&T Texas Under FTA Relating to Refusal to Negotiate Conforming Amendment Implementing Collocation Power Metering,* Order No. 5, January 7, 2009. ("Docket No. 35982").

In the final section, AT&T Texas sets out several additional errors that it believes the Arbitrators have made, seeks clarification on certain points, and submits a correction that the Arbitrators requested.

AT&T Texas would address one final problem. UTEX purports to deal this proceeding a lethal blow by announcing to the FCC that any action by the Arbitrators not completed before July 9, 2010 is a "nullity".[6] In its August 23, 2010, Reply Comments filed with the FCC regarding its Renewed Petition for Preemption, UTEX asserted, "... the TPUC has lost jurisdiction already, and any "order" would be nullity."[7] AT&T Texas has asked UTEX if it continues to assert its nullity claim. UTEX indicated it would use its nullity claim if it is not satisfied with the agreement the Commission approves. Unless UTEX commits to this arbitration and agrees to be bound by it, including rulings in the event of an appeal, the Commission should dismiss this arbitration as moot. UTEX should not be able to hold onto what it believes to be a regulatory "trump card."

[6] "Nullity" is defined as "nothing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect." Black's Law Dictionary, Rev. 4th Ed., 1968.

[7] UTEX's Reply Comments to Renewed Petition for Preemption, August 23, 2010 at 2. The FCC's Wireline Competition Bureau yesterday rejected a second attempt by UTEX to preempt the Texas Commission by denying UTEX's renewed Petition. WC Docket No. 09-134, *In the Matter of UTEX Communications Corporation Petition for Preemption* before the FCC, Memorandum Opinion and Order (Rel. Oct. 6, 2010).

II.
THE ARBITRATORS' POP TEST FOR ESP TRAFFIC VIOLATES FEDERAL LAW AND PUC PRECEDENT

Intercarrier Compensation for Traffic Involving UTEX's ESP Customers

DPL Issues: UTEX 2 through 21, 30, 34, and 35 through 46; AT&T NIM-6, NIM 6-8(b), 6-10, 6-11, and 6-15

1. The Arbitrators correctly recognize that existing federal law controls here.

On page 3 of the Proposal for Award, the Arbitrators correctly recognize "[e]xisting law provides a limited exemption from access charges for certain communications involving an ESP." The Arbitrators further recognize and accept that the FCC has directed them to conduct this arbitration under "existing law."[8] The Arbitrators err, however, in taking the existing law that affords a limited exemption for ESPs from access charges and converting that exemption into a carrier's exemption from access charges for delivering what is clearly long-distance traffic. In doing so, the Arbitrators both misunderstand and misapply the FCC's ESP exemption.

As the Arbitrators recognize, "the ESP exemption permits an ESP to purchase a local business line from the Local Exchange Carrier ("LEC") that provides it local service instead of paying access charges to that LEC as an IXC would."[9] Thus, the FCC created the ESP exemption as a fiction that allows ESPs to purchase local business lines to exchange calls with their customers. The FCC characterized the ESP exemption precisely this way in its 2009 Order denying UTEX's request for forbearance from the imposition of access charges under § 251(g):

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[8] *Id.* at 44.

[9] Proposal for Award at 35 (emphasis added). *See also* at 10 ("ESP exemption allows ESPs *to purchase local business lines* and, where applicable, pay special access surcharges instead of paying access charges.") (emphasis added).

> Under the Commission's access charge regime, the so-called "ESP exemption" permits enhanced service providers (ESPs) to purchase local business access lines from intrastate tariffs as end users, or to purchase special access connections, and thus avoid paying carrier-to-carrier access charges.[10]

As AT&T Texas will show below, the Arbitrators have granted to UTEX precisely what the FCC denied it in this 2009 Order in which the FCC concluded that, pursuant to § 251(g), access charges should continue to be applied in interconnection agreements between CLECs like UTEX and ILECs like AT&T Texas.

Further, the Arbitrators have created a special compensation system for UTEX that the Commission has never approved for any other interconnection agreement in the State of Texas. All other CLECs are operating under interconnection agreements that contain terms the same as or similar to the ones AT&T Texas has proposed – e.g., the compensation terms in Docket No. 28821. As the Arbitrators have previously determined in prohibiting the parties from updating their proposed contract language, the "existing law" on intercarrier compensation has not changed since the Commission issued its rulings in Docket No. 28821.[11] Thus, if the Arbitrators do not eliminate their POP test and special compensation scheme, they will be giving UTEX an unfair competitive advantage over hundreds of other CLECs that are operating under other agreements.

2. The Arbitrators failed to apply the FCC's end-to-end analysis in jurisdictionalizing ESP traffic.

The critical problem with the Arbitrators' treatment of "ESP traffic" lies in the Arbitrators' failure to apply an end-to-end analysis to the calls they have classified as

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[10] *In re Feature Group IP Petition for Forbearance from Section 251(g) of the Communications Act*, 2009 WL 151500, 24 FCC Rcd. 1571, ¶ 4, n. 13 (Rel. Jan. 21, 2009).

[11] Arbitrators' Order No. 30 at 2 – 3, ¶ 5, rejecting UTEX's Attachment addressing compensation as improper because UTEX failed to show any change of law to support it.

entitled to treatment as "local" traffic. The FCC requires jurisdiction to be based "on the endpoints, not the actual path, of each complete communication."[12] "[B]oth court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications."[13]

The Arbitrators' crafting of special intercarrier compensation for ESP traffic fails to follow an end-to-end analysis of a call and, instead, allows a call to be treated as originating where an ESP delivers the call to UTEX. The Arbitrators state:

> The Arbitrators conclude that under existing law AT&T Texas may not assess access charges upon UTEX when (1) UTEX provides service to a customer that meets the FCC's definition of an ESP, (2) the ESP customer elects to be treated as an ESP, (3) the ESP has a POP in the AT&T Texas local calling area in which the calling or called end user served by AT&T Texas is located, and (4) the traffic is routed through that POP.[14]

These requirements that the ESP customer have a POP in the AT&T Texas local calling area in which the calling or called end user served by AT&T Texas is located when the traffic is routed through that POP do not result – as the Arbitrators apparently intend – in limiting ESP traffic to traffic that is truly local.[15] To the contrary, this standard fails to take into account where the call actually originates and, if implemented, would improperly allow long-distance traffic to be treated as local.

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[12] *In re AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 2005 WL 433235, 20 FCC Rcd 4826 at ¶ 5 (Feb. 23, 2005).

[13] *Id.* at ¶ 5, n. 6 (citing and quoting *Teleconnect Co. v. Bell Tel. Co. of Pennsylvania*, File No. E-88-83, *et al.*, Memorandum Opinion and Order, 10 FCC Rcd 1626, 1629-30, paras. 12 - 14 (1995)).

[14] Proposal for Award at 35.

[15] *Id.* 36 ("When UTEX's ESP customer and the AT&T Texas calling or called end user are in the same local calling area, UTEX is not providing interexchange transport and is, therefore, not an IXC.").

A review of the Arbitration Award in Docket No. 33323 – a decision the Arbitrators mistakenly claim is consistent with their ESP/POP compensation system[16] – illustrates what is wrong with the Arbitrators' compensation system for ESP traffic.

The Arbitrators' new POP test allows UTEX to break a call into two parts so that the geographic location of the origination of the call – *i.e.*, the location of the calling party – is no longer part of the jurisdictional analysis. This Commission discerned – and precluded – precisely this problem in Docket No. 33323, which involved an interpretation of UTEX's current interconnection agreement with AT&T Texas. In that agreement, the parties voluntarily agreed that there would be no intercarrier compensation for local traffic "to or from an ESP."[17] In Docket No. 33323, the Commission rejected UTEX's argument that all calls from its "ESP" customers were local because the ESPs should be viewed as the *originators* of the calls – *i.e.*, the calls should be viewed as originating at either the real or virtual POP where the "ESPs" handed the calls off to UTEX.[18] The Commission correctly, and repeatedly, rejected this argument as contrary to the FCC's requirement that *all* calls be jurisdictionalized on the basis of an end-to-end analysis that looks at the locations of the calling and the called party – not at some POP where an ESP hands the call off to UTEX:

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[16] *Id.* at 38. ("The Arbitrators' decision here, which requires an ESP customer's POP to be located in the local calling area in which the calling or called end user served by AT&T Texas is located in order to qualify for the ESP Traffic provisions of the ICA, is consistent with the Commission's decision in Docket No. 33323").

[17] Docket No. 33323, Arbitration Award at 67. It should be noted that this voluntarily agreed-to provision is – to the best of AT&T Texas' knowledge – the only interconnection agreement that addresses both calls to and calls from an ESP. All other interconnection agreements with AT&T Texas address only ISP-bound traffic – *i.e.*, traffic flowing only to an ISP customer that is actually purchasing a business line from either the ILEC or the CLEC. Special terms for ISP-bound traffic became necessary as a result of the FCC's ISP Remand Orders. No such special terms are required for traffic to or from an ESP.

[18] *Id.* at 109 ("According to UTEX, for purposes of the ICA, an ESP originates the traffic in a LATA and terminates to a PSTN user in the same LATA.").

> [*D*]*etermining whether a call is interLATA (for which intercarrier compensation is due) requires an examination of the call's originating and terminating points, not the point at which UTEX's customers may hand the call to UTEX or where UTEX's customer may be virtually located.* UTEX itself stated that the traffic it passes to AT&T Texas would be considered interLATA if looking at the end-points of its traffic."[19]
>
> *The Arbitrator agrees with AT&T Texas that the originating and terminating end points (not the path) of the call determine the call's jurisdiction.* ... [N]either the location of UTEX nor its customers constitute the originating point of calls terminated to AT&T Texas. Rather, consistent with the FCC's end-to-end analysis, the calling party's location (NPA/NXX) is the originating point and the called party's location (NPA/NXX) is the terminating point.[20]
>
> Under the FCC's end-to-end analysis, *the end points of a call determine the jurisdictional nature of the call and what charges apply.*[21]
>
> The fact that UTEX's customers meet UTEX in the same LATA as the call session's PSTN terminating point does not affect the jurisdiction of the call or the compensation that applies. *In fact, UTEX has described the process carrier's carriers use to avoid paying intercarrier compensation for terminating calls.*[22]

The Arbitrators' new POP test here fails to follow this end-to-end analysis. The Arbitrators take two steps that attempt to comply with Docket No. 33323, but they are mistaken in believing they have cured the problem. The Arbitrators would hold that: (1) the LATA is not sufficient but, instead, the POP must be located in the same exchange as the called party;[23] and (2) the POP cannot be a virtual situs but must be an actual physical location.[24] These two requirements will only (1) prevent UTEX from treating as local those calls handed off within a LATA but delivered to AT&T Texas outside the local

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[19] *Id.* at 104 – 105 (emphasis added).

[20] *Id.* at 113 (emphasis added).

[21] *Id.* at 118 - 119 (footnote omitted) (emphasis added).

[22] *Id.* at 104 (emphasis located).

[23] Proposal for Award at 39 - 40.

[24] *Id.* at 50.

calling area of the AT&T Texas customer and (2) eliminate calls handed off to a "virtual situs." The Arbitrators' definitions of "POP" and "ESP traffic" will still allow UTEX to treat as local any long distance calls that UTEX's "ESP" customers physically hand off to UTEX in the same calling area as the AT&T Texas customer receiving the call. In short, the Arbitrators' POP requirement will facilitate massive amounts of access charge avoidance in the major metropolitan areas in the State and any other area where UTEX and its ESP customers find it expedient to have transmission equipment.

Under the Arbitrators' compensation system for ESP traffic, all UTEX and the ESP must have is transmission equipment in downtown Houston, Dallas, Austin or San Antonio so that UTEX can take the hand-off from its ESP in those areas. When UTEX does so, the calls UTEX delivers to AT&T Texas within those heavily trafficked local calling areas with be treated as local, even when the calls originate in Los Angeles, New York, El Paso or Lubbock. In other words, with the interconnection agreement the Arbitrators propose for UTEX, UTEX could become the vehicle for avoiding access charges for the terminating end of the vast majority of long-distance traffic in the State.

The plain language of the Arbitrators' ESP traffic and POP definitions leaves no doubt that UTEX will be able to avoid access charges for long distance traffic under this scheme. The Arbitrators state:

> For an ESP customer to be considered within the same local calling area as the calling or called end user, the Arbitrators require the ESP to have a POP in the local calling area in which the calling or called end user served by AT&T Texas is located.[25]

[25] *Id.* at 38.

In other words, all an ESP customer has to do is have a POP in the same local calling area where AT&T Texas' customer is situated. The Arbitrators then define a POP for an ESP as:

> the point that [the ESP's] network physically connects with a LEC's network (e.g., UTEX's network).[26]

Under this definition, the ESP's POP will be where the ESP uses its transmission equipment to physically hand off the traffic to UTEX's transmission equipment. Therefore, under the Arbitrators' POP definition, *all* of the following calls will be treated as local traffic:

Calling Party	**LEC, IXC, VOIP Provider, CMRS Carrier, etc. that provides service to Calling Party**	**ESP**	**UTEX and the POP**	**AT&T Texas**	**Called Party: AT&T Texas Customer**
Los Angeles, California	Los Angeles, California	Call travels 1,500 miles, Interstate	Hand-off via transmission equipment in Downtown Houston	Downtown Houston	Downtown Houston
New York, New York	New York, New York	Call travels 1,500 miles, Interstate	Hand-off via transmission equipment in Downtown Dallas	Downtown Dallas	Downtown Dallas
El Paso	El Paso	Call travels 560 miles, Intrastate, InterLATA	Hand-off via transmission equipment in Downtown San Antonio	Downtown San Antonio	Downtown San Antonio
Lubbock	Lubbock	Call travels 400 miles, Intrastate, InterLATA	Hand-off via transmission equipment in Downtown Austin	Downtown Austin	Downtown Austin

Under the rulings in Docket No. 33323, *all* of these calls would be subject to access charges. If the Arbitrators are to be consistent with Docket No. 33323, they must

[26] *Id.*

abandon their definition for ESP traffic and avoid use of the POP for jurisdictionalizing calls. More important, the Arbitrators must also abandon this POP test if they are to abide by the restriction of § 251(g), which authorizes only the FCC to change the existing access charge regime.

3. The Arbitrators' treatment of ESP traffic is inconsistent with the Arbitrators' correct analysis that UTEX is acting as an IXC when it delivers traffic from a different local calling area to AT&T Texas.

The new POP test the Arbitrators have created is inconsistent with the Arbitrators' correct determinations that UTEX is acting as an IXC and liable for access charges when it delivers to AT&T Texas "communications that originate ... in different states or countries."[27] The Arbitrators correctly apply federal law in concluding that (1) UTEX is "an IXC subject to the FCC's rules for interstate and foreign access charges" whenever UTEX delivers interstate traffic to AT&T Texas and (2) UTEX is similarly "subject to intrastate access charges" for "communications that originate and terminate in different local calling areas within Texas."[28] All of the communications described in the chart above originate and terminate in different local calling areas and, under the Arbitrators' own analysis, should render UTEX liable for access charges. But under the Arbitrators' ESP traffic and POP definitions, *all* of this traffic will be treated as local.

The Arbitrators' new POP test also violates the FCC's *IP-in-the-Middle* order[29] that the Arbitrators elsewhere recognize is controlling here:

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[27] *Id.* (emphasis in original).

[28] *Id.*

[29] *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges,* WC 02-361, Order ¶ 17, 19 FCC Rcd. 7457 (rel. Apr. 21, 2004) (emphasis added).

> In the *IP-in-the-Middle* order, the FCC concluded that access charges applied when an IXC (in that case, AT&T) used the public Internet to transport communications between PSTN users in different exchanges.[30]

When any of the calls illustrated above originate with a calling party served by a LEC on the PSTN and the ESP uses the public Internet to assist in routing those calls from, e.g., California or New York, those calls *are* IP-in-the-middle. The Arbitrators correctly recognize that UTEX's ESP customer cannot convert such traffic into local traffic subject to the ESP exemption simply because the enhanced services of the Internet are used in the delivery of the call:

> The FCC further stated that "[w]e do not believe that a service of the type described above – which provides no enhanced functionality to the end user due to the conversion to IP – is the kind of use of the 'Internet or interactive services' that Congress sought to single out for exceptional treatment." Just as AT&T merely used the Internet as a transmission medium in the *IP-in-the-Middle* order, UTEX would also merely be using the Internet to transport communications between exchanges.[31]

In direct contradiction to this accurate analysis of the *IP-in-the-Middle* order and existing law, the Arbitrators have done precisely what the FCC said could not be done – exempt such traffic from access charges simply because the ESP hands the call off to UTEX in the local exchange where UTEX delivers the call to AT&T Texas.

Under one of the very examples the Arbitrators cite as a situation where UTEX would be functioning as an IXC, the Arbitrators' POP and ESP traffic definitions render that traffic local. The Arbitrators state that UTEX would be an IXC when "UTEX's ESP customer has physical facilities in another state and [] the public Internet is used to transport communications between those facilities and UTEX."[32] But, when the

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[30] Proposal for Award at 48.

[31] *Id.*

[32] *Id.* at 49.

Arbitrators' definitions for ESP traffic and POP are applied, UTEX avoids access charges for such a call simply by arranging to have an ESP deliver the traffic to UTEX in the local exchange where the call is terminated. Under the Arbitrators' definitions, the physical facilities that an ESP has where the call originates are irrelevant.

The Arbitrators appear to wrongly assume that UTEX's ESP customer will have physical facilities *only* where the calling party originates the call. ESPs – like IXCs – can have many POPs and may have no POPs in the calling area where the call originates. The Arbitrators also appear to wrongly assume that UTEX's ESP customer has a direct connection to the calling party – *i.e.*, the ESP's POP will be in the same local calling area as the calling party. That is *not* so. As Mr. Lowell Feldman admitted at the hearing, traffic aggregators like Transcom – a UTEX "ESP" customer – pick up traffic from a variety of sources – CMRS carriers, VoIP providers, IXCs – but do not directly serve the calling party and need not have a "POP" in the same local calling area as that of the calling party.[33]

The Arbitrators have erred in failing to apply the established end-to-end analysis that the FCC requires. Presumably by mistake or misunderstanding, the Arbitrators have impermissibly treated an ESP's POP as the originating end of a call. The phrase "end-to-end analysis" is found nowhere in the Proposal for Award and receives only a single mention in the Arbitrators' DPL Matrix at p. 25, where the Arbitrators properly reject UTEX's diagrams because they are "devoid of locational information." As the Arbitrators correctly recognize in the Matrix, without that "locational information," "it is impossible to rate calls" because "current law recognizes geographical locations and

[33] *e.g.*, Hearing Tr. at 402 - 403 (Feldman describing Transcom as an "ESP aggregate [or]" that takes traffic from Vonage or Skype and delivers it to UTEX).

end-to-end analysis as key determinants of calling rating."[34] UTEX left out that locational information in order to mislead the Arbitrators into ignoring the originating end of the traffic UTEX delivers to AT&T Texas. Had the Arbitrators followed their own reasoning in that section of the Matrix, they undoubtedly would have reached the legally correct result.

Instead, the Arbitrators forgot the FCC's end-to-end analysis requirement – as UTEX encouraged them to do – and opted for an unprecedented "point of presence" compensation system that has absolutely no basis in law and no evidentiary record to explain or support it. While Arbitrators are not required to accept one or the other party's proposed contract terms, they are not free to create a compensation system that was never a contested issue in the case and never made the basis of either party's evidence.[35]

4. The Arbitrators have misunderstood and misapplied the ESP exemption.

The Arbitrators have been misled into concluding they should craft special treatment for traffic involving ESPs when establishing intercarrier compensation under a §§ 251/252 ICA. With the exception of ISP-*bound* traffic, for which the FCC has prescribed specific treatment, federal law never has and does not now authorize such special treatment.

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[34] Arbitrators' Attachment B – Proposal for Award Matrix at 25, addressing UTEX Issue 33.

[35] 47 U.S.C. § 252(b) (authorizing state commissions only to arbitrate the "open issues" presented by the parties) and PUC Rule 21.95(t)(1) (limiting the Arbitrators' authority to proposing an award based on "the record of the arbitration hearing" and limiting the issues to be decided to those "presented for arbitration by the parties").

The ESP exemption is an exemption for the ESP – not an exemption for carriers like UTEX.[36] The purpose of the ESP exemption is to allow ESPs to provide enhanced services to their own end users via a retail product without incurring access charges. That is why the ESP exemption applies to ESP-bound traffic: it excuses ESPs from paying access charges when they use incumbent LEC networks to receive calls from their end user customers. UTEX's "ESP traffic" is not ESP-bound; it is PSTN-bound and it will often originate in a different local calling area from where the call terminates. The federal district court in the California GNAPs' appeal of a California PUC decision assessing access charges correctly applied this limitation on the ESP exemption in affirming the state commission's award of access charges against GNAPs:

> [A]s the FCC made it clear, the ESP exemption only applies to ISP-bound traffic. *See ISP Remand Order*, 16 F.C.C.R. at ¶ 1 (stating that ISP-bound traffic falls outside the scope of § 251(b)(5)). Here, although GNAPs claims that its traffic is *ISP originated*, CPUC found that the traffic is not routed *to* an ISP; i.e., *it is not ISP-bound.* Rather, the subject traffic terminates on the PSTN.[37]

UTEX has misled the Arbitrators into accepting UTEX's argument that "VoIP is merely 'ISP-bound' traffic in reverse" and can be used to create an exemption for carriers.[38] The FCC has *never* recognized such an exemption, and it has never permitted carriers like UTEX to take advantage of the ESP exemption to avoid access charges. In proposing to expand a federal exemption beyond its current scope, the Arbitrators exceed the Commission's authority under §§ 251 and 252 and violate the

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[36] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 16 FCC Rcd. 9151, 2001 WL 455869 (2001) ("ISP Remand Order"), 11 & n. 18 (subsequent history omitted).

[37] *Global Naps California, Inc. v. Public Utils. Comm'n of California*, No. CV 09-1927 ODW (PJWx), Order re Motions to Dismiss for Failure to State a Claim at p. 12 (M. D. Cal. Apr. 27, 2010).

[38] UTEX Br. at 25 - 26.

FCC's explicit directive that the Commission conduct this arbitration in accordance with *existing* law. While the Arbitrators' Proposal for Award elsewhere indicates an unwillingness to exceed their authority under federal law, UTEX's confusing arguments and descriptions about the nature of its "ESP" traffic have led them to do so.

Elsewhere in the Proposal for Award, the Arbitrators cite with approval both FCC and other state commission decisions that reject the very compensation system the Arbitrators have inadvertently approved with their POP test.[39] The Arbitrators correctly recognize that the FCC refused to allow carriers to use the ESP exemption in the *Northwestern Bell* Order and accurately quote the FCC's statement that "'End users that purchase interstate services from interexchange carriers do not thereby create an access charge exemption for those carriers.'"[40] The Arbitrators also properly cite with approval the Kansas and Illinois Commission decisions that refused to allow a CLEC much like UTEX to use the ESP exemption to avoid access charges for traffic that originated and terminated in different local calling areas.[41] As the Illinois Commission stated, "the FCC's exemption does not apply 'to traffic that is delivered from ESPs.' Rather, it applies to the ESPs themselves, exempting ESPs from certain interstate access charges."[42]

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[39] Proposal for Award at 37, citing *In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling,* CC 86-1, Memorandum Opinion and Order ¶ 21, 2 FCC Record 5986 (rel. Oct. 5, 1987), vacated as moot by 7 FCC Rcd. 5644 (rel. Sept. 4, 1992) (hereinafter "*Northwestern Bell* Order"); Docket No. 08-0105, *Illinois Bell Telephone Co. v. Global NAPS Illinois, Inc.,* Order at 44 (Illinois Commerce Comm'n 2009) ("Global is a carrier, not an ESP, and hence the ESP exemption does not apply to Global, even if the customers of Global's affiliates . . . were in fact ESPs."); In re CLEC Coalition, Docket No. 05-BTKT-365-ARB et al., Order No. 16 ¶ 30, 2005 WL 2331520 (Kansas Corp. Comm'n 2005) ("[The ESP] exemption applies to the information service provider, not to carriers . . . that provide service to ESPs.").

[40] *Id.*

[41] *Id.*

[42] Docket No. 08-0105, Illinois Commerce Comm'n 2009, Order at 44.

The Arbitrators' crafting of special treatment for "ESP traffic" that allows UTEX to avoid access charges for long distance traffic simply by having transmission facilities in a local calling area and accepting delivery of long distance traffic from its ESP customer's transmission facilities is inconsistent with all of these FCC and state commission decisions, which properly limit the ESP exemption to ESPs.

The Arbitrators' POP scheme is also inconsistent with the Arbitrators' own correct analysis in concluding that UTEX would ordinarily not be able to purchase UNE loops for its ESP customers because UTEX's ESP customers would not use these network elements as business lines to place or receive calls.[43] To the contrary, as the Arbitrators accurately observe, these "ESP" customers would use these network elements to route traffic to UTEX and other carriers. The Arbitrators correctly held that the FCC ESP exemption does not permit such use of network elements because UNE loops are by their very definition intended for an actual "consumer" of the line.[44] The role of these ESPs as routers of traffic no more qualifies UTEX to obtain the ESP exemption as a result of accepting delivery of long distance traffic from them than it would qualify UTEX to purchase UNE loops for them. The logic of the Arbitrators' analysis of when UTEX may lease UNE loops only when it provides them to consumers (*i.e.,* calling or called parties) is inconsistent with the Arbitrators' treatment of the UTEX POP as the originating point of calls handed off to UTEX by its ESP customers.

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[43] Proposal for Award at 78 ("Rather than consuming the service provided by the network element itself, a UTEX ESP customer will ordinarily use that service as an input to the communications service that the ESP provides to its customers. Network elements to a UTEX ESP customer will qualify as UNE loops, however, when the ESP customer uses the service provided by the network elements for the ESP's own administrative purposes (e.g., to place and receive calls)."

[44] *Id.*

5. The Arbitrators' proposal that the parties craft an audit system for their POP test for ESP traffic is not workable and further violates federal law.

The Arbitrators have directed the parties to propose language that would create an audit system to ensure that UTEX is routing through an ESP traffic trunk only traffic that meets the Arbitrators' definitions. With respect, AT&T Texas objects to this directive, which only further highlights the error of the Arbitrators' proposal. No party proposed a POP as the mechanism for jurisdictionalizing calls, and neither party litigated as an issue any contract language that would address how such an impermissible compensation scheme could be audited.

The Arbitrators cannot require the parties either to negotiate or propose such language during the short period between issuance of their Proposal for Award and the filing of exceptions to that Proposal. The FTA sets time frames for negotiation and arbitration of contract terms. The Arbitrators have no authority to override those time frames by directing the parties to negotiate and then submit for arbitration contract terms during the 10-day period the Commission's rules provide for preparing and submitting exceptions to a Proposal for Award.

In addition, the Arbitrators are limited to the issues presented by the parties,[45] and neither the Arbitrators' new POP compensation test nor an audit procedure for implementing it was the subject of any testimony or competing contract language in this case.

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[45] 47 U.S.C. § 252(b) (authorizing state commissions only to arbitrate the "open issues" presented by the parties) and PUC Rule 21.95(t)(1) (limiting the Arbitrators' authority to proposing an award based on "the record of the arbitration hearing" and limiting the issues to be decided to those "presented for arbitration by the parties").

Subject to and without waiving these objections, AT&T Texas provides in Attachment A the terms AT&T Texas has thus far tentatively drafted regarding such an audit system.[46] These terms reveal just how unworkable the Arbitrators' unprecedented compensation system really is. The Arbitrators have crafted a compensation system that turns on the physical facilities and activities of UTEX's ESP customers. Thus, the Arbitrators have made examination and testing of the facilities and activities of non-parties to the agreement a critical part of any meaningful audit. With all due respect, the Arbitrators' POP test is not merely unprecedented and unlawful – it is an unworkable idea.

6. The Arbitrators should eliminate their definitions for ESP traffic and POP from the agreement and all related terms and approve AT&T Texas' proposed language for intercarrier compensation.

The parties' agreement should not include any specialized terms for compensation for "ESP Traffic" and should not require a separate trunk group for this traffic. Under AT&T Texas' proposed language, a call to/from an ESP that originates and terminates in the same Local Calling Area is subject to reciprocal compensation. An interexchange call to/from an ESP (*i.e.*, a call that originates and terminates in different local exchanges) is subject to access charges. This approach is consistent with the FCC's access charge rule, which states: "Carrier's carrier charges [*i.e.*, access charges] shall be computed and assessed upon *all* interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."[47] When UTEX provides telecommunications services to

[46] AT&T Texas has not drafted a definitions section as it understands that those would be included at the time the contract is conformed.

[47] 47 C.F.R. § 69.5(b) (emphasis added).

an ESP like Transcom that provides transport service to VoIP providers, CMRS carriers, or IXCs, UTEX is not exempt from access charges for traffic delivered to AT&T Texas when that traffic originates in a different local calling area. As the FCC has explained, "enhanced service providers are treated as end users for purposes of [the FCC's] access charge rules" (and thus pay end user charges rather than access charges), but "[e]nd users that purchase interstate services from interexchange carriers do not thereby create an access charge exemption for those carriers."[48]

III.
THE ARBITRATORS' RULING ON 500 NUMBERS EXCEEDS THE COMMISSION'S AUTHORITY UNDER §§ 251/252, INTERFERES WITH A FEDERAL TARIFF, AND VIOLATES FEDERAL LAW

AT&T: a) Should UTEX be allowed to require AT&T to continue to route its traffic in blocking situations?
UTEX: b) Can AT&T block UTEX's 500 numbers?

DPL Issue: AT&T NIM 5

In ruling that AT&T Texas must "perform switch translations for UTEX's 500 numbers" and ordering the parties to "draft compensation provisions for 500 numbers,"[49] the Arbitrators have exceeded the Commission's authority under §§ 251/252. The routing of 500 numbers is a federal access service that is not subject to arbitration under §§ 251/252.[50] Pursuant to § 251(g), only the FCC – not state commissions – has authority to dismantle the federal access charge regime.[51] Sections 251/252 do not

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[48] *Northwestern Bell* Order, 1987 WL 344405, 2 FCC Rcd. 5986, ¶ 21 (Rel. Oct. 5, 1987), *vacated on other grounds*, 7 FCC Rcd 5644 (1992) (emphasis added).

[49] Proposal for Award at 58 - 59.

[50] *In the Matter of MCI Telecommunications Corp. Application for Review of the Ameritech Operating Companies*, 12 FCC Rcd. 16525, 1997 WL 612729, Order ¶¶ 1 - 2 (rel. Oct. 7, 1997) (identifying 500 service as an "access service," denying MCI's petition challenging Common Carrier Bureau's order allowing ILECs to establish separate rate elements for the provision of 500 access service, and plainly indicating that the service is subject to exclusive FCC regulation).

[51] *Atlas Tel. Co. v. Okla. Corp. Comm'n*, 400 F.3d 1256, 1263 (10th Cir. 2005) ("As the United States Court of Appeals for the District of Columbia Circuit has explained, § 251(g) is a transitional

authorize state commissions to arbitrate the terms and conditions for access service. UTEX has misled the Arbitrators by falsely characterizing 500 service as an "exchange service."[52] UTEX cannot unilaterally change a federally tariffed access service that it wants AT&T Texas to provide into a local exchange service. UTEX describes the 500 service as something it wants to provide its customers but what it is asking from AT&T Texas is the provisioning of AT&T Texas access services by routing calls to 500 numbers. The act of routing calls to 500 numbers is the same as the act of routing 800 or 900 calls: all are federal access services and the party ordering the service has to pay for it under the terms and conditions of the federal tariff.[53] UTEX's request that AT&T Texas perform translations for UTEX's 500 numbers is just another attempt by UTEX to get access services for free.

As AT&T Texas witness Mr. Mark Neinast explains,[54] AT&T Texas includes in its access tariff a service known as Advanced Carrier Identification Service ("ACIS"). If a carrier purchases this service, AT&T Texas implements switching translations to route the carrier's 500 traffic to the Carrier Identification Code ("CIC") of the purchaser. In this way, the purchaser could use the non-geographic 500 numbers to provide services to end users in much the same way that a 900 service works. AT&T Texas' 500 service may not be not routed for free in AT&T Texas' network, but must be used in conjunction

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provision designed to keep in place certain restrictions and obligations, *including the existing access charge regime*, until such provisions are superseded by FCC regulations." (Citing *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432 - 433 (D.C.Cir.2002)) (emphasis added).

[52] Proposal for Award at 53 - 54, summarizing UTEX's position on this issue as being that its 500 service is "designed to be telephone exchange service rather than telephone toll service."

[53] With 900 service, the calling party pays for the call. With 800 service, the business purchasing the 800 services pays for the calls it receives.

[54] Neinast Direct at 20, line 16 – 21, line 22.

with an access service in much the same way that 900 numbers are used. Carriers that use it must pay for it at the federally tariffed price.

The Arbitrators correctly hold that UTEX is not entitled to routing of 500 numbers without compensating AT&T Texas for terminating 500 calls. In ordering the parties to draft compensation language for that routing, however, the Arbitrators exceed their authority under federal law.[55] As § 251(g) makes clear, the FCC – not state commissions – controls the pricing for a federally tariffed access service.

In ordering AT&T Texas to perform the necessary translations to route those numbers, the Arbitrators also exceed their authority under federal law. Those translations are required to be performed only in the event UTEX or its customers order the services available under AT&T Texas federal 500 access service tariff. In reasoning that "[n]o law requires UTEX to serve its ESP customers using 500 numbers purchased from AT&T Texas' tariff rather than using UTEX's own 500 numbers,"[56] the Arbitrators reveal a fundamental misunderstanding of 500 access service. 500 access service is not about the purchase of numbers; it is about the routing of calls. UTEX is no more entitled to require AT&T Texas to route 500 numbers outside the terms of AT&T Texas' federal 500 access service tariff than it would be to require AT&T Texas to route 900 numbers outside the terms of AT&T Texas federal 900 access service tariff. That UTEX has a batch of 500 numbers does not mean that it can receive AT&T Texas federal access services for free. It must pay for those services in accordance with the terms of the tariff.

[55] The relevant tariff sheets for the ACSI service are attached hereto as Attachment B.

[56] Proposal for Award at 58.

500 number access service – like 800 and 900 number access services – is a federally tariffed access service that would allow these numbers to be used nationwide. AT&T Texas' federal tariff governs when and how those numbers are to be loaded into AT&T Texas' switches. The Arbitrators have no authority to order AT&T Texas to route UTEX's 500 numbers. And UTEX has no right under federal law to obtain routing of 500 numbers unless and until UTEX or its customers comply with the terms and conditions of AT&T Texas' federal 500 access service tariff.

The Arbitrators' ordering of compensation for 500 access service consistent with its POP compensation scheme for ESP traffic is wrong in several ways. It is wrong both because the Arbitrators have no authority to set pricing that is different from AT&T Texas' federal 500 access service tariff and because the POP compensation scheme in and of itself violates federal law. As the Arbitrators acknowledge, UTEX wants to use its 500 numbers to allow AT&T Texas customers to call its ESP customers.[57] The Arbitrators would allow those calls to be treated as Local Traffic "when the call is routed through the POP of UTEX's ESP customer located in the same local calling area as the AT&T Texas end user and otherwise qualifies as ESP Traffic."[58] This scheme creates regulatory arbitrage on the originating end of a call, enabling UTEX to avoid access charges not only for terminating traffic it gets from its ESP customers but also for *all* 500 calls sent to those ESPs. The Arbitrators have no authority to override both the state and federal access charge regimes in this way.

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[57] *Id.* (describing "a call from an AT&T Texas end user to a UTEX 500 number" and holding that such a call "is subject to the Local Traffic provisions of the ICA ... when the call is routed through the POP of UTEX's ESP customer located in the same local calling area as the AT&T Texas end user and otherwise qualifies as ESP Traffic.")

[58] *Id.*

The Arbitrators' ordering of compensation terms for 500 service is also wrong because the only compensation terms placed in issue here are those in AT&T Texas' federal tariff. The Arbitrators cannot supplant those terms and cannot create contract language the parties did not propose. To do so is inconsistent with the Arbitrators' ruling in Order No. 30, which limited the parties to their 2005 contract language, absent a showing of change of law.

In addition, the Arbitrators are mistaken in contemplating that routing of 500 numbers can be tracked or audited in any reasonable way. The Arbitrators state that 500 calls will be treated as local "when the call is routed to a called end user located in the same local calling area as the AT&T Texas end user."[59] But as the Arbitrators' noted elsewhere in the Proposed Award, 500 numbers are non-geographic in nature, affording AT&T Texas no means to identify where these calls are terminated.[60] The Arbitrators also lack authority to order the parties to negotiate terms for 500 number service during the short time frame between issuance of the Proposal for Award and the filing of Exceptions. As previously stated, the FTA prescribes time frames for negotiation and arbitration of contract terms, and the Arbitrators cannot side step those statutory time frames.

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[59] *Id.*

[60] Proposal for Award at 59.

IV.
THE ARBITRATORS' RULING ALLOWING UTEX TO OBTAIN THE COLLOCATION POWER AMENDMENT VIOLATES COMMISSION PRECEDENT

What terms and conditions provide the clarity required to order physical and virtual collocation in accordance with FCC orders?

DPL Issue: AT&T Collo-1 and AT&T NIM 1-4

The ruling by the Arbitrators allowing UTEX to obtain Section 4.0 (Power Metering) provision of the Collocation Attachment from the CLEC Coalition ICA approved in Docket No. 28821 is contrary to the Commission's Order in Docket No. 28821 and contrary to recent Commission precedent that upheld the limited availability of the Collocation Power Amendment.[61] As Ms. Deborah Fuentes Niziolek testified, the Collocation Power Amendment is not available as a stand-alone attachment.[62] While the Arbitrators are correct that the Collocation Power Amendment was approved in Docket No. 28821, they fail to recognize the fact that the Commission limited the availability of the amendment to qualified CLECs for a limited time, expiring on December 26, 2006.[63]

In Docket No. 28821, the Commission was asked to decide if CLECs should be allowed, at their option, to implement power metering in their collocation spaces in AT&T Texas' locations. The Commission specifically declined to make a ruling on the power consumption issue, indicating that "the parties have not presented a workable solution or arrangement for establishing the meters."[64] Finding that the parties had not

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[61] Docket No. 35982.

[62] Fuentes Niziolek Rebuttal at 7, lines 14 - 15.

[63] *See* Attachment C, Docket No. 28821, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement,* Commission's Order Approving Interconnection Agreement Amendment and Establishing Implementation Procedures, September 27, 2006.

[64] *See* Docket No. 28821, Track 1 Award at 259.

presented a workable solution or arrangement for establishing the meters, the Commission then directed the "parties to work collaboratively to establish the metering arrangement."[65] The result of the collaborative negotiation was an "agreed to" Collocation Power Amendment.[66] In its Order adopting the agreed-to Collocation Power Amendment, the Commission specifically limited the availability of the amendment to the CLEC parties in Docket No. 28821 and those CLECs that opted into one of the interconnection agreements approved in that docket (Successor T2A agreements). The Commission's Order also limited the availability of the agreed Collocation Power Amendment to a 90-day period from the date of the Commission's September 27, 2006 Order in Docket No. 28821. That 90-day period expired on December 26, 2006. The Commission did not (as the Arbitrators attempt to do here) require AT&T Texas to include the terms of this amendment in its collocation tariff or to make those terms available to carriers that did not participate in Docket No. 28821. Because the amendment is contained only in certain T2A Successor Agreements, UTEX, or any other CLEC, wanting the Collocation Power Amendment must "MFN" pursuant to § 252(i) into a T2A Successor Agreement containing that attachment.[67]

The Commission reaffirmed this position and upheld the limited availability of the Collocation Power Amendment most recently in a post-interconnection dispute case brought by Level 3 Communications, LLC.[68] In that case, the Commission rejected Level 3's attempt to acquire the amendment through a change of law provision in the

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[65] *See* Attachment C.

[66] Fuentes Niziolek Rebuttal at 7, lines 15 - 17.

[67] *Id.* at 7, line 13 - 8, line 13.

[68] Docket No. 35982, Order on Reconsideration of Order No 5, issued March 23, 2009.

ICA. Referring to its previous order in Docket No. 28821, the Commission noted that the amendment that was collaboratively developed was available only through the process set out in the Docket No. 28821 September 27, 2006 Order.[69]

Finally, the Arbitrators' ruling that the Power Amendment is to be made a part of the interconnection agreement is in direct conflict with the Arbitrators' own ruling in Order No. 30, where the Arbitrators ordered UTEX to remove the Collocation Power Amendment from the interconnection agreement.[70]

The Arbitrators' ruling in its Proposal for Award, allowing UTEX to obtain the Collocation Power Amendment is in error and should be reversed consistent with the ruling in Docket No. 28821 and Docket No. 35982.

V.
ADDITIONAL EXCEPTIONS AND/OR REQUESTS FOR CLARIFICATION

AT&T Texas submits the following additional exceptions and/or requests for clarification regarding discrete sections of the Proposal for Award and the Arbitrators' Matrix.

1. Should AT&T Texas' Intervening Law provision, non-waiver provision, and process for incorporating changes of law be adopted?

AT&T Texas GTC Issue 24

The Arbitrators adopted the intervening law provisions found in the CLEC Joint Petitioners ("CJP") interconnection agreement, referring General Terms and Conditions ("GTC") §§ 5.1 and 5.2 of that agreement.[71] The section references, however, should

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[69] *Id.* at 3.

[70] Order No. 30 at 5, ¶ 19 ("Collocation Power Amendment. UTEX does not assert that AT&T Texas agreed with this new appendix or that a change of law justifies the appendix. UTEX shall remove the appendix from the ICA it is proposing in this docket.").

[71] Arbitrators' Attachment B – Proposal for Award Matrix at 61.

be to GTC §§ 3.1 and 3.2, which are the provisions in the CJP interconnection agreement that address intervening law.

2. Should the Resale attachment state that AT&T Texas' Telecommunications Services are available for resale pursuant to § 251(c)(4) of the FTA, and should it specify what services may be resold?

AT&T Texas Resale Issue 2

The Arbitrators rejected AT&T Texas' proposed reference to § 2.2.1.3 of the GTC because AT&T Texas failed to provide a correct section reference.[72] The reference was intended to be to a provision stating that AT&T Texas' Telecommunications Services are available for resale pursuant to § 251(c)(4) of the FTA and specifying what services may be resold. The Arbitrators invited AT&T Texas to provide a correct reference. The correct reference is to AT&T Texas proposed GTC § 1.6.

3. a) Should the different types of traffic exchanged between the Parties be referenced in this agreement?

AT&T Texas Issue NIM-1

AT&T Texas objects to identifying ESP traffic as traffic exchanged between the parties and further objects, for the reasons set forth above, to special compensation for "ESP traffic." AT&T Texas also objects to a reference to Cellular Traffic as traffic exchanged between the parties. UTEX is not a CMRS carrier and did not request the compensation terms for Cellular Traffic. Cellular Traffic is not to be exchanged between the parties: UTEX merely testified in the hearing that it has a practice of delivering Cellular Traffic to AT&T Texas for termination. AT&T Texas is not a CMRS carrier and has no cell-phone customers who will be placing calls to UTEX customers. Cellular traffic will route only one way – from UTEX to AT&T Texas – and, because UTEX is not

[72] *Id.* at 83.

a CMRS carrier and has not requested the compensation terms applicable to CMRS carriers, any such traffic UTEX routes to AT&T Texas should be jurisdictionalized based on CPN in the same way as land-line traffic.

4. a) Should traffic subject to reciprocal compensation under Section 251(b)(5) be called "Section 251(b)(5)" traffic or "local" traffic?

AT&T Texas Issue NIM 6-1

In using UTEX's term "Local Traffic" instead of AT&T Texas' proposed language using "Section 251(b)(5) traffic," the Arbitrators have failed to apply existing law.[73] Not all § 251(b)(5) traffic is local.[74] UTEX's proposed use of the term "Local Traffic" fails to reflect current, existing law regarding reciprocal compensation.

5. a) Should each party be responsible for sending the CPN for traffic that originates on its respective network and for passing on the CPN it receives from a third party?

b) How should the Parties be compensated for traffic that is passed without CPN?

c) Should a Party use commercially reasonable effort to prohibit the use of its local exchange services for the purpose of delivering interexchange traffic?

d) Can AT&T require all New Technology traffic and users to have a traditional number even when the technology does not require or need the number?

AT&T Texas Issue NIM 6-5

For the reasons stated above, the Arbitrators have erred in modifying AT&T Texas' proposed language regarding CPN to permit a unique compensation scheme for ESP traffic.[75]

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[73] *Id.* at 187.

[74] *Core Communications, Inc. v. FCC*, 592 F.3d 139, 144 (D.C. Cir. 2010).

[75] Arbitrators' Attachment B – Proposal for Award Matrix at 205, Proposal for Award at 42 – 43.

6. *AT&T Texas Proposed Definition in § 51.1.65 for "ISP-Bound Traffic"*

The Arbitrators have erred in refusing to include a definition for ISP-Bound Traffic as well as the proposed inter-carrier compensation language AT&T Texas proposed for this traffic.[76] The Arbitrators declined to include this definition because they concluded that their "ESP traffic" language encompassed that traffic. Because the Arbitrators' ESP traffic/POP scheme violates federal law, the ESP traffic provisions the Arbitrators have proposed cannot be used and a specific definition for ISP-Bound Traffic is needed.

7. Should the agreement contain a discrete OSS appendix to set forth terms and conditions for UTEX to obtain nondiscriminatory access to AT&T Texas' Operations Support System (OSS) functions?

OSS DPL Issue 1

On page 118 of the Proposal for Award, the Arbitrators state that "AT&T Texas shall provide UTEX with procedures for pre-ordering, ordering, provisioning, and other OSS functions for products and services to which UTEX is entitled under this ICA and for which such procedures do not currently exist within 120 days of UTEX's request for such procedures." The Arbitrators then "direct the parties to draft ICA language implementing these requirements. If the parties cannot agree to such language, each party shall include its proposed language and the reasons supporting its adoption in the party's exceptions to the Proposal for Award."[77] Again, the Arbitrators have no authority to require the parties to negotiate contract language during the 10-day period for filing exceptions to their Proposal for Award. Sections 251 and 252 of the FTA establish time frames for negotiating and arbitrating contract terms, and the Arbitrators cannot override those time frames. Subject to and without waiving this exception, AT&T Texas

[76] Arbitrators' Attachment C - Definitions at 62.

[77] Proposal for Award at 118.

proposes its BFR language contained in § 10 of the Alpheus Appendix UNE and attached hereto as Attachment D as its proposed language. This language adequately addresses the Arbitrators' concerns.

8. a) Should the agreement contain terms and conditions for the methods by which UTEX can access UNEs and perform its own combinations?

AT&T Texas Issue UNE 8

AT&T Texas accepts the contract language the Arbitrators approve in this issue but except to the Arbitrators' omission of important terms that are included in the CJP provisions the Arbitrators have chosen. Sections 2.3 and 2.8 of the CJP Attachment UNE must be included in the agreement in order for it to properly reflect the parties' respective rights and obligations. The Arbitrators have indicated an intent to be consistent with what the Commission approved in Docket No. 28821. All of the provisions approved in that docket must be included in order for the agreement to be consistent with what the Commission approved in Docket No. 28821. Without these provisions, the agreement might be misread to require AT&T Texas to provide combinations it is not required to perform under §§ 251/252 of the FTA. To avoid a possible dispute over AT&T Texas' obligations under the UNE Attachment, AT&T Texas respectfully requests the Arbitrators require these missing provisions, attached hereto as Attachment E.

In addition, AT&T Texas requests that the Arbitrators clarify their Proposal for Award, which erroneously suggests § 2.2 of the CJP Attachment UNE addresses combinations when, in fact, that provision does not address combining obligations but, instead, addresses methods of access to UNEs.

Respectfully submitted,

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ATTORNEYS FOR SOUTHWESTERN BELL TELEPHONE COMPANY D/B/A AT&T TEXAS

CERTIFICATE OF SERVICE

I, Thomas J. Horn, General Attorney for AT&T Texas, certify that a true and correct copy of this document was served to all parties hereto on October 7, 2010, in the following manner, via: U.S. Mail, electronic mail, facsimile, or overnight delivery.

ATTACHMENT A

1.0 Audits

1.1 AT&T TEXAS may request an audit, at any time but not more frequently than once a quarter, to determine whether the traffic UTEX claims is ESP Traffic does in fact meet all the criteria set forth in this Attachment and by the Public Utility Commission of Texas in Docket 26381. UTEX shall reimburse AT&T TEXAS for all fees, costs and expenses in the event that an audit finds that more than 5% of the traffic UTEX claims is ESP Traffic does not qualify as ESP Traffic.

1.2 UTEX shall reimburse AT&T TEXAS pursuant to the applicable AT&T TEXAS tariff for all switched access charges and any applicable late payments should AT&T TEXAS' audit determine that the traffic did not meet the definition of ESP Traffic as set forth in this Attachment and in Docket 26381.

1.3 UTEX shall prove and provide the required documentation to AT&T TEXAS that the ESP Customer meets the criteria as stated in FCC Rule 64.702(a).

1.4 For purposes of auditing, UTEX must establish that the traffic it has passed on the ESP trunks is eligible for the ESP exemption.

1.5 UTEX agrees to enter into agreements with its ESP Customers that allow for the sharing of any information with AT&T TEXAS for verification purposes of ESP treatment of traffic. UTEX shall be responsible for ensuring that its ESP Customers comply with these audit provisions.

1.6 AT&T TEXAS may request, and UTEX shall be responsible for providing, any required information from UTEX or UTEX ESP Customer in order to determine whether the traffic passed between the parties qualifies as ESP Traffic as set forth in Docket 26381.

1.7 UTEX shall provide AT&T TEXAS with the physical address of each ESP Customer's POP through which UTEX is routing ESP Traffic in order for AT&T TEXAS to determine whether the ESP Customer's POP location is within AT&T TEXAS Local Calling Area in which the calling or called End User served by AT&T TEXAS is located.

1.8 UTEX shall assist AT&T TEXAS in the verification of the ESP Customer's POP locations by working cooperatively with AT&T TEXAS to gain the required information to verify the ESP Customer's POP.

1.9 AT&T TEXAS shall be allowed to (a) verify the location of each ESP Customer's POP, (b) determine whether the calls passed on the ESP Trunk groups meets the criteria in Docket 26381, and (c) determine whether the ESP Customer meets the ESP Exemption definition as stated in FCC Rule 64.702(a).

1.10 UTEX shall provide AT&T TEXAS with access to its premises and to its ESP Customers' premises, and shall provide to AT&T TEXAS the appropriate and necessary documentation in order for AT&T TEXAS to audit compliance with this Attachment and the requirements set forth in Docket 26381.

1.11 UTEX shall provide access to its premises and facilities to AT&T TEXAS and assist AT&T TEXAS in determining whether a physical connection between the ESP Customer POP and UTEX exists.

1.12 UTEX shall be responsible for providing access for AT&T TEXAS to UTEX's ESP Customer's premises and facilities and operations in order to determine that the ESP Customer meets the FCC's 64.702(a) definition and does in fact have a POP at the claimed location and does in fact hand off the ESP Traffic to UTEX at that POP.

ATTACHMENT B

6. Switched Access Service (Cont'd)

6.4 Miscellaneous Services Descriptions (Cont'd)

6.4.4 Advanced Carrier Identification Service (ACIS)

(A) General

Advanced Carrier Identification Service (ACIS) is an originating offering utilizing trunk side Switched Access Services from both equal access and non-equal access offices and provides the ability for calls to be delivered to access customers based on the dialed Personal Communication Service (PCS) subscriber number. ACIS will use the dialed PCS subscriber number (e.g., 1+500+NXX-XXXX) to identify the access customer (i.e., the transport carrier) to whom the call will be delivered and then deliver the call to the access customer.

The ACIS functionality will be available in suitably equipped end offices or access tandems. If an ACIS routed call originates in an office not equipped to provide the identification function, the call will be routed to an office where the function is available.

ACIS allows the PCS subscriber to originate calls using one-plus (1+), zero plus (0+) and from public coin phones. The Telephone Company will block an ACIS originated call if it originates through a 101XXXX access code, zero minus(0-) dialing or 0- Transfer Service. (C)

(B) Provisioning

Unless prohibited by technical limitations, originating traffic that is routed using ACIS may, at the option of the customer, be combined in the same FGB, FGC, FGD, BSA-B, BSA-C or BSA-D trunk group with the customer's other Access Service traffic. Where such technical limitations do exist, the Telephone Company will provide notification to the customer prior to establishment of ACIS. At the option of the customer, ACIS routed traffic originating from a non-equal access office may be combined with a customer's equal access FGD or BSA-D Service. This arrangement is only available when a customer utilizes tandem routed FGD or BSA-D. For this arrangement, premium access charges will apply for such originating ACIS usage. When FGD or BSA-D becomes available in an end office, originating ACIS routed traffic from that end office must be provided with FGD or BSA-D.

6. Switched Access Service (Cont'd)

6.4 Miscellaneous Services Descriptions (Cont'd)

6.4.4 Advanced Carrier Identification Service (ACIS) (Cont'd) (N)

(B) Provisioning (Cont'd)

The customer may use FGA, FGB, FGC, FGD, BSA-A, BSA-B, BSA-C or BSA-D to terminate a call that was routed using ACIS. When FGA, FGB, FGC, FGD, BSA-A, BSA-B, BSA-C or BSA-D is used to terminate a call that was routed using ACIS, the customer is required to deliver ACIS originated calls to the Telephone Company in the standard POTS number North American Numbering Plan format. (N)

Material previously appearing on this page now appears on 2nd Revised Page 6-45.4.

ATTACHMENT C

DOCKET NO. 28821

ARBITRATION OF NON-COSTING ISSUES FOR SUCCESSOR INTERCONNECTION AGREEMENTS TO THE TEXAS 271 AGREEMENT	§ § § §	PUBLIC UTILITY COMMISSION OF TEXAS

ORDER APPROVING INTERCONNECTION AGREEMENT AMENDMENT AND ESTABLISHING IMPLEMENTATION PROCEDURES

This Order approves the interconnection agreement amendment relating to collocation power (Amendment) jointly filed on August 29, 2006, by Southwestern Bell Telephone, L.P. f/k/a SBC Texas d/b/a AT&T Texas, Cbeyond Communications of Texas, LP, McLeod USA Telecommunications Services, Inc., NTS Communications, Inc., XO Communications Services, Inc., Logix Communications and MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services (Parties) pursuant to the Track I Arbitration Award (Award)[1] issued by the Public Utility Commission of Texas (Commission). The Commission finds that the Amendment complies with the requirements of § 252 of the Federal Telecommunications Act of 1996 (FTA). Additionally, the Commission establishes the procedures specified below for the implementation of the Amendment.

I. Background

The Commission initiated this docket at the October 23, 2003, Open Meeting by severing the non-costing issues from Docket No. 28600[2] into the current proceeding. On January 23, 2004, the following parties individually filed petitions for arbitration to actively participate in the non-costing phase: Denton Telecom Partners, I, L.P. d/b/a Advantex Communications (Advantex); Navigator Telecommunications, LLC (Navigator);[3] Birch Telecom of Texas, Ltd.,

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[1] *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28821, Arbitration Award – Track I Issues (Feb. 23, 2005).

[2] *Arbitration of Phase I Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28600.

[3] Navigator Telecommunications, LLC consists of Stratos Telecom, Inc., Comcast Phone of Texas, LLC, Heritage Technologies, Ltd. and FamilyTel of Texas, LLC.

LLP and ionex Communications South, Inc. (Birch-ionex); CLEC Joint Petitioners;[4] MCImetro Access Transmission Services, LLC; MCI WorldCom Communications, Inc.; Intermedia Communications, Inc., and Brooks Fiber Telecommunications of Texas, Inc. (collectively MCI); AT&T Communications of Texas, LP; TCG Dallas; and Teleport Communications Houston, Inc. (collectively AT&T); CLEC Coalition;[5] Sage Telecom of Texas, LP (Sage);[6] and AT&T Texas.[7]

The Commission issued the Award in this docket on February 23, 2005.[8] In the Award, the Commissioners, acting as arbitrators, addressed a number of issues including collocation. In the Award, the Commission directed the parties to collaboratively establish a collocation power metering arrangement within 60 days of the final order in this proceeding.[9] The Commission issued the final order approving the conformed interconnection agreements on August 29, 2005.[10] Subsequently, the Arbitrators extended the time for the Parties to file an agreed proposal.[11] On August 29, 2006, the Parties filed a Joint Motion for Approval of Interconnection Agreement Amendment – Collocation in Compliance with Final Order (Joint Motion). In the Joint Motion, the Parties requested: (1) waiver of P.U.C. SUBST. R. 21.101 and approval of the

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[4] CLEC Joint Petitioners consists of AccuTel of Texas, LP, BasicPhone, Inc., BroadLink Telecom, LLC, Capital 4 Outsourcing, Inc., Cutter Communications, Inc. d/b/a GCEC Technologies, Cypress Telecommunications, Inc., DPI Teleconnect, LLC, Express Telephone Services Inc., Extel Enterprises, Inc. d/b/a Extel, Connect Paging, Inc., d/b/a Get A Phone, Habla Comunicaciones, Inc., IQC, LLC, National Discount Telecom, LLC, Quick-Tel Communications, Inc., Rosebud Telephone, LLC, PhoneCo, LP, Smartcom Telephone, LLC, Tex-Link Communications, Inc., and WesTex Communications, LLC d/b/a WTX Communications.

[5] CLEC Coalition consists of AMA Communications, LLC d/b/a AMA*TechTel Communications, Cbeyond Communications of Texas, LP, ICG Telecom Group, Inc., KMC Telecom Holdings, Inc. on behalf of its certificated entities, KMC Telecom III, LLC, KMC Data, LLC and KMC Telcom V, Inc., d/b/a KMC Network Services, Inc., McLeodUSA Telecommunications Services, Inc., nii Communications Ltd., NTS Communications, Inc., Time Warner Telecom of Texas, LP, XO Texas, Inc., Xspedius Communications, Inc., Z-Tel Communications, Inc., Carrera Communications, LP, Westel, Inc., OnFiber Communications, Inc., Yipes Enterprise Services, Inc., and WebFire Communications, Inc.

[6] On April 26, 2004, Sage filed a request to withdraw its petition. Order No. 14 granted Sage's petition to withdraw on May 18, 2004.

[7] AT&T Texas filed an Omnibus Petition for Arbitration with all CLECs whose interconnection agreements expired on October 13, 2003 or would soon expire. SBC listed the applicable CLECs in an appendix to the petition. *See* AT&T Texas's Omnibus Petition for Arbitration, Appendix A at 15-20 (Jan. 23, 2004).

[8] *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Arbitration Award—Track 1 Issues (Feb. 23, 2005).

[9] Arbitration Award—Track 1 Issues at 259 (Feb. 23, 2005).

[10] Order Approving Interconnection Agreements (Aug. 29, 2006).

[11] Order Extending Time to File (Apr. 12, 2006).

Amendment on an expedited basis; (2) approval of the Amendment in its entirety without modification; and (3) establishment of a separate docket for the filing of Amendments.

II. Amendment Implementation

All competitive local exchange carrier (CLEC) parties in Docket No. 28821 and any CLEC that has opted into one of the interconnection agreements approved in this docket may adopt the Amendment through the process specified here. The CLECs shall have 90 days from the date of this order within which to execute the Amendment. Within 10 business days from the date of this order, AT&T Texas shall notify all eligible CLECs concerning the availability of the Amendment and the deadline for execution. Given the large number of identical Amendments to be filed by numerous parties, the Commission finds good cause to waive the procedural requirements of P.U.C. SUBST. R. 21.101 to allow approval of the form Amendment on a consolidated basis for all parties instead of an individual basis for each party. In order to facilitate the Amendment filing process, the Commission has established Docket No. 33198, Implementation of Collocation Power Amendments between AT&T Texas and CLECs Pursuant to Docket No. 28821, for the filing of executed Amendments to be effective upon filing.

III. Commission Findings

1. The Commission's review and approval of the interconnection amendment implementing the collocation decision in the Track I Arbitration Award are consistent with FTA §§ 251 and 252. Section 252(b)(1) provides that if an incumbent local exchange carrier (ILEC) and CLEC cannot successfully negotiate rates, terms and conditions in an interconnection agreement, either of the negotiating parties "may petition a State commission to arbitrate any open issues." Section 252(e) requires that any interconnection agreement adopted by negotiation or arbitration "shall be submitted for approval to the State commission."

2. The Commission is the state regulatory body responsible for arbitrating interconnection agreements approved pursuant to the FTA.

3. The Commission finds that the filed interconnection agreement amendment is consistent with the requirements of §§ 251 and 252 of the FTA.

4. The Commission finds that the filed interconnection agreement amendment is consistent with the Commission's procedural rules, unless otherwise waived.

5. The Commission finds that the filed amendment does not discriminate against a telecommunications carrier not a party to the amendment and is consistent with the public interest, convenience and necessity.

6. Given the large number of identical Amendments to be filed by numerous parties, the Commission finds good cause to waive the procedural requirements of P.U.C. SUBST. R. 21.101 to allow approval of the Amendment on a consolidated basis for all parties instead of an individual basis for each party.

IV. Ordering Paragraphs

1. The procedural requirements of P.U.C. SUBST. R. 21.101 are waived.

2. The Amendment is approved in its entirety without modification.

3. Eligible CLECs wishing to adopt the Amendment shall execute the Amendment within 90 days from the date of this order. Executed Amendments shall be filed in Docket No. 33198.

4. Within 10 business days from the date of this order, AT&T Texas shall notify all eligible CLECs concerning the availability of the Amendment and the deadline for execution.

5. All motions, appeals or other requests for general or specific relief not expressly granted are denied.

SIGNED AT AUSTIN, TEXAS the 27th day of September 2006.

PUBLIC UTILITY COMMISSION OF TEXAS

PAUL HUDSON, CHAIRMAN

JULIE PARSLEY, COMMISSIONER

BARRY T. SMITHERMAN, COMMISSIONER

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ATTACHMENT D

TEXAS
INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

between

Southwestern Bell Telephone, L. P.
d/b/a
AT&T Texas

and

Alpheus Communications, L.P.

An Asterisk (*) represents language ordered in the Texas PUC Docket No. 25188, Arbitration Award between SWBT-TX and ALPHEUS.

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three days prior and one day after the conversion date, consistent with the suspension AT&T places on itself for orders from its customers.

*9. INTENTIONALLY LEFT BLANK

10. BONA FIDE REQUEST

10.1 Except as set forth in Section 10.2, this Bona Fide Request process applies to each Bona Fide Request submitted by ALPHEUS to AT&T.

*10.2 The BFR process set forth herein does not apply to those services requested pursuant to Report & Order and Notice of Proposed Rulemaking 91-141 (rel. Oct. 19, 1992) paragraph 259 and n. 603 and subsequent rulings. In addition, the BFR process does not apply to any Unbundled Network Element established by the FCC or the Commission or to services provided to other Telecommunications Carriers.

*10.2.1 The BFR process does not apply to ALPHEUS for UNEs or UNE combinations where AT&T and other CLEC(s) have agreed upon terms and conditions with AT&T and AT&T has fully implemented such UNE or UNE combinations, when such UNEs could work, generically for multiple CLECs with no revisions. When such UNE or combination of UNEs is available to other CLECs as described above, or when AT&T provides ALPHEUS a New UNE Combination developed pursuant to section 10.15 below, upon request from ALPHEUS, this Agreement will be amended to add such UNE or UNE combination and its related price. Ten days after Commission's approval, of an amendment to this Agreement to add such UNE or UNE Combination, AT&T will honor ALPHEUS' service order.

10.3 All BFRs must be submitted with a BFR Application Form in accordance with the specifications and processes set forth in the sections of the (i) CLEC Handbook subject to the relevant terms of the GT&C of this Agreement. Included with the Application, ALPHEUS shall provide a technical description of each requested UNE or combination of UNEs, drawings when applicable, the location(s) where needed (if known), the date required, and the projected quantity to be ordered with a non-binding three (3) year forecast. For purposes of this Appendix, a "Business Day means Monday through Friday, excluding Holidays observed by AT&T.

10.4 A Bona Fide Request (**"BFR"**) is the process by which ALPHEUS may request AT&T to provide ALPHEUS access to (i) an additional or new, undefined UNE, that is required to be provided by AT&T under the Act but is not available under this Agreement or defined in a generic appendix at the time of ALPHEUS'